INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	15

CITATIONS

Cases:

Agnello v. *United States*, 269 U. S. 20 ..... 8, 11
Belcher v. *United States*, 50 F. (2d) 573 11
Boske v. *Comingore*, 177 U. S. 459 14
Commonwealth v. *Everson*, 123 Ky. 330 9
Commonwealth v. *Wakelink*, 230 Mass. 567 9
Creech v. *United States*, 97 F. (2d) 390 11
De Lore v. *Smith*, 67 Ore. 306 9
Goode v. *State*, 158 Miss. 616 9
Ingram v. *United States*, 113 F. (2d) 966 11
Jackson, Ex parte, 96 U. S. 727 13
Lennon v. *United States*, 20 F. (2d) 490 14
Lewis v. *United States*, 92 F. (2d) 952 11
Mullaney v. *United States*, 82 F. (2d) 638 14
Nardone v. *United States*, 302 U. S. 379 10
Olmstead v. *United States*, 277 U. S. 438 ..... 9, 10, 11, 15
People v. *Cotta*, 49 Cal. 166 9
People v. *Hobberd*, 96 Misc. 617 9
Sackett, Ex parte, 74 F. (2d) 922 14
Schoborg v. *United States*, 264 Fed. 1, certiorari denied, 253 U. S. 494 8
Shore v. *United States*, 49 F. (2d) 519, certiorari denied, 283 U. S. 865 11
Smith v. *United States*, 2 F. (2d) 715 8
State v. *Allen and Carter*, 37 La. Ann. 685 9
State v. *Minneapolis Milk Co.*, 124 Minn. 34 9
United States v. *Feldman*, 104 F. (2d) 255, certiorari denied, 308 U. S. 579 8
United States v. *Lee*, 274 U. S. 559 8
United States v. *Lefkowitz*, 285 U. S. 452 10

319235—41——1

	Page
Cases—Continued.	
United States v. *Muscarelle*, 63 F. (2d) 806, certiorari denied, 290 U. S. 642	11
United States v. *Polakoff*, 112 F. (2d) 888, certiorari denied October 14, 1940, No. 295, present Term	10, 13
United States v. *Seeman*, 115 F. (2d) 371	12
United States v. *Socony-Vacuum Oil Co.*, 105 F. (2d) 809, reversed, 310 U. S. 150	14
United States v. *Weiss*, 34 F. Supp. 99	8, 12
Weiss v. *United States*, No. 42, October Term, 1939	10
Whitcombe v. *United States*, 90 F. (2d) 290, certiorari denied, 302 U. S. 759	11
Statutes:	
Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, Sec. 605 (U. S. C., Title 47, Sec. 605)	2, 12
11 U. S. C., Section 52 (b) (5)	3
Consol. Laws N. Y., c. 41, Sec. 1423, Par. 6	9
Penal Code of New York, L. 1923, c. 642, Sec. 721	9
Miscellaneous:	
Department of Justice Circular No. 3229, May 2, 1939	14
H. R. 4228, 77th Cong., 1st Sess	10

In the Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 962, 963, 980

MARTIN M. GOLDMAN, JACOB P. SHULMAN AND THEODORE GOLDMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court of the United States for the Southern District of New York, other than the oral ruling on the preliminary motion to suppress evidence (R. 81–82, 164–168). The opinion of the Circuit Court of Appeals affirming the convictions (R. 1089–1096) is reported at 118 F. (2d) 310.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 26, 1941 (R. 1104). Petitions

for writs of certiorari were filed on behalf of Martin M. Goldman and Jacob P. Shulman (Nos. 962 and 963) on April 18, 1941, and on behalf of Theodore Goldman (No. 980) on April 23, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether evidence obtained by eavesdropping upon conversations in an adjoining room by means of a "detectaphone"—a listening device which amplifies sound vibrations coming through the wall—should be excluded in federal courts, because such eavesdropping constitutes a "search" prohibited by the Fourth Amendment.

2. Whether the use of a detectaphone for the purpose of overhearing one end of a telephone conversation in an adjoining room constitutes an interception of a telephone communication prohibited by Section 605 of the Federal Communications Act.

3. Whether petitioners were entitled to inspect official memoranda prepared by federal agents from which they refreshed their recollections before being sworn as witnesses.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605) provides in part as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof * * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *.

STATEMENT

Petitioners and one Kandell were indicted on February 1, 1940 (R. 9), in the United States District Court for the Southern District of New York for conspiracy to violate 11 U. S. C. Section 52 (b) (5). The one-count indictment charged in part that the defendants conspired to file a petition in bankruptcy and to cause it to be dismissed in consideration of fraudulently receiving a sum of approximately $400.00 from one Robert Hoffman and others (R. 3–7). The indictment was dismissed as to Kandell at the close of the Government's case (R. 531). The petitioners were convicted on July 26, 1940 (R. 943), and each of them received a sentence of eighteen months' imprisonment and a fine of $25.00 (R. 14, 16, 18). The convictions were unanimously affirmed by the Circuit Court of Appeals for the Second Circuit (R. 1104). The petitioners have filed separate, but substantially identical, petitions for writs of certiorari.

The evidence showed that one Hymovitz made an assignment for the benefit of creditors to Robert Hoffman, an attorney (R. 176–178). The petitioners, counsel for certain creditors, proposed to Hoffman that the assets of Hymovitz should be sold in bulk to a purchaser who would pay enough to allow for a 40% settlement with creditors and for some expenses and in addition $400.00 to be kept secret and divided among the conspirators (R. 193–194, 201–202, 211). Upon Hoffman's refusal to join in this plan, petitioners filed an involuntary bankruptcy petition which was drawn up in such a manner that it could be dismissed without notice to creditors in case Hoffman should change his mind (R. 196, 202). Hoffman disclosed the facts to the Federal Bureau of Investigation and thereafter pretended to acquiesce in the petitioners' plan (R. 202–203, 247–248).

On the night of February 6, 1937, two agents of the Federal Bureau of Investigation, Turner and Ransom, went to the office building where petitioner Shulman had his law office, and with the consent and assistance of the building superintendent, but without the knowledge of Shulman, obtained entrance to Shulman's office, Room 1509, and to the adjoining office, Room 1508, which was unoccupied (R. 45–46, 53, 56–57, 88). There was a small opening for a steam pipe at the base of the wall between the two offices. Through the space between the pipe and the edge of the aperture the

agents passed a wire into Room 1508 far enough to attach a small disc-shaped "carbon microphone." The microphone was then drawn back into the hole until it was about an inch inside the wallpaper surface of Shulman's office (R. 87–89). In Room 1508 the wire was attached to an amplifier and headphones. The agents tested the installation and finding that it enabled them to overhear conversations carried on in Room 1509 disconnected the amplifier and phones and departed leaving only the microphone in the wall with a small piece of wire leading into Room 1508 (R. 86–87, 90, 96–97).

The following afternoon, Turner returned to Room 1508, accompanied by agents Schroeder and Rubenstein and a stenographer. They brought with them the amplifier and earphones, which were once more connected with the carbon microphone (R. 100). They also installed another device known as a contact microphone or detectaphone which was equipped with a separate amplifier and earphones (R. 101, 104). The detectaphone operated by being placed against the wall of Room 1508 where it picked up sound vibrations coming through the wall from the adjoining office (R. 94, 104). Turner, who had been in Shulman's office the previous night, described its arrangement to Schroeder (R. 103, 112–113), but the proper location of the detectaphone was determined by trial and error. Schroeder moved it over the wall until

he found the best position (R. 113–117, 119–120). It was discovered that the carbon microphone in the wall, probably because the steam was now turned on in the pipe, yielded nothing intelligible, and this apparatus was dismantled (R. 98, 102, 105–106, 119–123, 152, 160–161).

Employing only the detectaphone, the agents listened to conversations in Shulman's office on the afternoon of April 7 and again on April 14, 21, and 26. The stenographer took down on a stenotype machine all that could be overheard, including conversations between Martin M. Goldman, Shulman, and Hoffman, as well as Shulman's end of several telephone conversations (R. 118–119, 160–161, 152–156).

Before the trial, there was filed a motion to suppress illegally obtained evidence (R. 20–27). A preliminary hearing was held, and at its conclusion the trial court ruled (1) that no evidence had been obtained from the carbon microphone which was installed by means of the trespass in Shulman's office; (2) that the unlawful entry for the purpose of installing the carbon microphone did not facilitate the installation or use of the detectaphone, and (3) that evidence obtained through the detectaphone was not obtained in violation of the Fourth Amendment or Section 605 of the Federal Communications Act (R. 164–168).

At the preliminary hearing and again at the trial defense counsel claimed the right to inspect notes

and memoranda made by the agents in the course of the investigation and to require the production of such papers from the files of the Federal Bureau of Investigation (R. 107, 108, 125, 156, 471, 482). It appeared that the agents had reviewed these notes and memoranda before testifying (R. 106, 132). The trial court noted that the memoranda were confidential communications between the investigating officers of the Government (R. 477–478), and ruled that counsel had no right to inspect them since they were not used by the witnesses to refresh their recollection while on the stand (R. 128–129, 470–472, 474, 482–485). Also the court, having examined the documents, was of the opinion at the preliminary hearing that the documents called for contained matter, having no bearing on the legality of the investigating methods, which the Government should not be required to disclose to the defense in advance of trial (R. 109–111, 127).

ARGUMENT

I

The holding of the Circuit Court of Appeals that the use of the detectaphone did not constitute a search within the meaning of the Fourth Amendment (R. 1095) is plainly correct. The detectaphone was installed by lawful entry into Room 1508, and its installation and use were in no wise facilitated by the previous trespass into Shulman's office for the purpose of installing the car-

319235—41——2

bon microphone (Finding of trial judge on preliminary hearing, R. 165).[1] The use of this device involved nothing more than observation from the outside of events transpiring within the privileged zone of Shulman's office. It was as if the agents had seen the actual commission of the crime by looking through the windows of Shulman's office, as was done in the *Agnello* case, (*Agnello* v. *United States*), 269 U. S. 20 at 28–29, and in *United States* v. *Feldman,* 104 F. (2d) 255 (C. C. A. 3, 1939), certiorari denied, 308 U. S. 579. As the court below pointed out (R. 1095), mere use of mechanical aids to the human senses, e. g., a field glass or a searchlight, without any physical intrusion on defendant's premises, has never been regarded as converting observation into "search." *United States* v. *Lee,* 274 U. S. 559; *Smith* v. *United States,* 2 F. (2d) 715 (C. C. A. 4, 1924). In no case which has come to our attention has testimony been excluded on the ground that it was obtained by eavesdropping with or without scientific aids. *Schoborg* v. *United States,* 264 Fed. 1 (C. C. A. 6, 1920), certiorari denied, 253 U. S. 494; *United States* v.

[1] At R. 103, 112–113 and 115, Schroeder testified that Agent Turner, who had been in Shulman's office on the night of April 6, 1937, described the lay-out of the office to him and that this helped somewhat in selecting a location for the detectaphone. But at R. 101 and 116–117, Schroeder testified unequivocally that the location was actually selected by experiment. Agent Turner witnessed the experiments in connection with the placing of the detectaphone (R. 119–120).

Weiss, 34 F. Supp. 99, 101 (S. D. N. Y., 1940); *People* v. *Cotta*, 49 Cal. 166 (1874); *State* v. *Allen and Carter*, 37 La. Ann. 685 (1885); *Goode* v. *State*, 158 Miss. 616 (1930); *De Lore* v. *Smith*, 67 Ore. 306 (1913); *Commonwealth* v. *Wakelin*, 230 Mass. 567 (1918); *State* v. *Minneapolis Mills Co.*, 124 Minn. 34, 43 (1913); *Commonwealth* v. *Everson*, 123 Ky. 330 (1906).

Petitioners concede (Pet. 16) that *Olmstead* v. *United States*, 277 U. S. 438, stands squarely in the way of their claim that their constitutional rights were violated,[2] and frankly predicate their contention upon the hope of reversal of that case. In that case this Court held that wire-tapping did not constitute a "search" within the Fourth Amendment. The majority opinion rests upon an interpretation of the Fourth Amendment as being limited to searches of "material things" such as may be seized, and upon the circumstance that

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[2] The *Olmstead* case also precludes reliance upon a State statute as the basis for excluding evidence offered in a Federal court, 277 U. S. 469. It seems clear, moreover, that the New York statute referred to by petitioners (Pet. 16) is on its face inapplicable to law enforcement officials. The statute provides as follows: "Eavesdropping.—A person who secretly loiters about a building, with intent to overhear a discourse therein, and to repeat or publish the same to vex, annoy, or injure others, is guilty of a misdemeanor." L. 1923, c. 642, Sec. 721 of the Penal Code of New York. Cf. *People* v. *Hebbard*, 96 Misc. 617, 620–621 (Sup. Ct. N. Y.) holding New York statute prohibiting wire-tapping inapplicable to police officers engaged in official duties (Consol. laws N. Y., c. 41, Sec. 1423, Par. 6).

there was "no entry of the houses or offices of the defendants." 277 U. S. at p. 464.

It is the position of the Government that the *Olmstead* case was correctly decided and that nothing in the present case warrants a reconsideration of that decision. The views of the Government as to the soundness of the majority opinion in the *Olmstead* case are fully set forth in our brief on the merits in *Weiss* v. *United States,* No. 42, October Term, 1939, pp. 46–55, to which the Court is respectfully referred.

As we pointed out in our brief in the *Weiss* case (pp. 52–53), so long as exploratory searches are forbidden by the Fourth Amendment (*United States* v. *Lefkowitz,* 285 U. S. 452) and a warrant must particularly describe "the persons or things to be seized," a reversal of the *Olmstead* decision would probably result in removing the entire subject from the purview of congressional policy where it has hitherto been thought to reside. *Olmstead* v. *United States, supra,* at pp. 465–466; *Nardone* v. *United States,* 302 U. S. at 383; and see concurring opinion of Judge A. N. Hand in *United States* v. *Polakoff,* 112 F. (2d) 888, 890 (C. A. A. 2, 1940), certiorari denied October 14, 1940, No. 295, present Term. Legislation now pending in Congress to authorize wiretapping in appropriate cases and with proper safeguards is based on the assumption that it remains within the power of the legislature to permit this type of policing activity. H. R. 4228, 77th

Cong., 1st Sess. But if this Court should overrule the *Olmstead* case this tentative experimental approach to a difficult socio-political problem would necessarily have to be abandoned in favor of the far more rigorous constitutional prohibition.

Furthermore, we doubt that the Goldmans are in a position to complain of the eavesdropping. The evidence in question was obtained by overhearing conversations in Shulman's office. Thus, even if the use of a detectaphone constitutes a search within the meaning of the Fourth Amendment, only Shulman's office was "searched" and there is no suggestion that the "persons, houses, papers, and effects" of the other two petitioners were seized, examined, or otherwise interfered with. It has been uniformly held that the legality of a search can be questioned only by the owner or lawful tenant of the premises searched.[3] Moreover, Theodore Goldman did not participate in any of the conversations overheard, and such portions of Martin Goldman's conservations as were overheard tended to support his defense rather than to incriminate him (R. 390–405).

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[3] *Lewis* v. *United States*, 92 F. (2d) 952 (C. C. A. 10, 1937); *United States* v. *Muscarelle*, 63 F. (2d) 806 (C. C. A. 2, 1933), certiorari denied, 290 U. S. 642; *Whitcombe* v. *United States*, 90 F. (2d) 290 (C. C. A. 3, 1937), certiorari denied, 302 U. S. 759; *Belcher* v. *United States*, 50 F. (2d) 573 (C. C. A. 8, 1931); *Shore* v. *United States*, 49 F. (2d) 519 (D. C. App., 1931), certiorari denied, 283 U. S. 865; *Ingram* v. *United States*, 113 F. (2d) 966 (C. C. A. 9, 1940); *Creech* v. *United States*, 97 F. (2d) 390 (C. C. A. 5, 1938). Cf. *Agnello* v. *United States*, 269 U. S. 20, 35.

II

Petitioners' contention that Section 605 of the Federal Communications Act was violated when the Federal Bureau of Investigation agents overheard one end of several telephone conversations as they were being spoken into the receiver is without merit. See *United States* v. *Weiss*, 34 F. Supp. 99, 101 (S. D. N. Y., 1940). In the first place, there was no interception of a telephone communication. Shulman's words were overheard, not intercepted.[4] His message proceeded undisturbed from its author to the telephone receiver and over the wires to the other parties, without any infringement by the agents upon this privileged channel of communication. As a matter of elementary physics, that energy which was transformed into electrical vibrations by the telephone was neither identical with nor the cause of the impulses which penetrated the wall and activated the delicate crystal in the detectaphone, although both had a common source in Shulman's vocal cords. Moreover, it is of the essence of a telephone interception that the interceptor is placed in a position to hear both

[4] Neither of the Goldmans participated in any of the telephone conversations which were overheard. As we have said, these petitioners cannot complain of an invasion of Shulman's privacy as a breach of their constitutional rights. It can hardly be supposed that a stricter doctrine will be applied to protect the immunities derived from Section 605 of the Federal Communications Act. *United States* v. *Seeman*, 115 F. (2d) 371, 374 (C. C. A. 2, 1940).

parties to the conversation. Cf. *United States* v. *Polakoff, supra.*

Not only was there no interception, but that which the agents overheard did not constitute a telephone communication within the meaning of Section 605. Mere "intent that [the words] constitute a telephone communication," the basis of the petitioners' argument on this aspect of the case (p. 18) can hardly bring a message within the scope of the Communications Act. A servant may be instructed to make a telephone call, yet no one would contend that an eavesdropper who heard the instruction given had intercepted a telephone conversation. It is now possible, and not uncommon, to make recordings of responses to incoming telephone calls for use when the telephone subscriber will be unable to answer his telephone. It does not seem reasonable to apply the prohibitions of Section 605 to one who overhears the preparation of such a recording. Finally, we may suggest the case of a letter intended for the mails, where it will be within the protection of the Fourth Amendment (*Ex parte Jackson,* 96 U. S. 727); but the recollection of a stenographer and her notes of dictation are nevertheless unquestionably proper sources of evidence. So, the user of a telephone entrusts his message to the circumambient air which, indifferently, conveys his words to telephone pick-up, friendly bystanders, casual eavesdroppers, or officers of the law bent on securing evidence.

III

Petitioners' complaint that the trial judge denied them an opportunity to inspect notes and memoranda constituting part of the records of the Federal Bureau of Investigation presents no question worthy of review by this Court on certiorari. The ruling was right not only on the ground that the notes and memoranda were not used by the witnesses to refresh their recollection on the stand, *Lennon* v. *United States,* 20 F. (2d) 490 (C. C. A. 8, 1927); *Mullaney* v. *United States,* 82 F. (2d) 638, 643 (C. C. A. 9, 1936),[5] but also on the alternative ground that the documents called for were privileged official communications. Department of Justice Circular No. 3229, May 2, 1939; *Ex parte Sackett,* 74 F. (2d) 922 (C. C. A. 9, 1935); *Boske* v. *Comingore,* 177 U. S. 459. Similarly, it cannot be said that the trial court abused its discretion in refusing to exhibit these papers to defense counsel at the preliminary hearing on the ground that to do so would have resulted in a premature disclosure of the Government's evidence (R. 108–111, 127, 477). See, *Nardone* v. *United States,* 308 U. S. 338, 342; *United States* v. *Seeman,* 115 F. (2d) 371, 374–375 (C. C. A. 2, 1040). Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 233–234.

[5] *United States* v. *Socony-Vacuum Oil Co.,* 105 F. (2d) 809, 837 (C. C. A. 7, 1939), cited by petitioners (Pet. 19) as declaring the right to inspect memoranda "consulted for refreshment before trial," was a case where the grand jury's

CONCLUSION

No special and important reason for the exercise of the discretionary power to review on certiorari has been shown in this case. The decision below is clearly correct, and the petitions point to no conflict of decision in the lower Federal courts. The constitutional issue involved is settled by the decision of this Court in the *Olmstead* case. We, therefore, respectfully submit that the petitions should be denied.

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minutes were actually used at the trial to refresh the recollection of a witness on the stand. And the decision of the Circuit Court of Appeals that opposing counsel had the right to inspect under these circumstances was one of the points upon which this Court reversed the case. 310 U. S. 150, 231–234.

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